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HUMAN RESOURCES MANAGEMENT

PROPOSED PROGRAMME BUDGET FOR THE BIENNIUM 1996-1997

Reform of the internal system of justice in the United Nations Secretariat

Note by the Secretary-General

Addendum

1. The Secretary-General has the honour to transmit to the General Assembly the comments made by the United Nations Administrative Tribunal (annex I) and by the Staff Union of the United Nations Secretariat (annex II) on his report dated 27 September 1995 entitled "Reform of the internal system of justice in the United Nations Secretariat" (A/C.5/50/2).

2. The Secretary-General emphasizes that the proposal contained in the report of 27 September 1995 is a central part of his efforts to substantially improve the efficiency of the Administration as a whole. He has noted that the Administrative Tribunal did not comment on a number of matters mentioned in the report, which, together with the lack of reliability of Joint Appeals Board (JAB) advice documented in paragraph 24 of the report, constituted the basis for the Secretary-General's determination that the present volunteer system needed to be changed. The reform seeks to introduce a professionalized and efficient first-level appeal system to replace the current volunteer system which, in an era of increasing management accountability for programme delivery coupled with declining resources and an increasing number of cases, makes it difficult to attract sufficient experienced and qualified staff to discharge these vital functions.

3. The Secretary-General has noted that, in the view of the Tribunal, "the JABs, on the whole, have been performing commendably". However, in his

experience over the past four years, he has received from the JAB advice of uneven quality, which was not readily acceptable and required in each case an in-depth review to determine whether each recommendation was supported by the evidence and conformed to the relevant legal principles, rules and policies.

4. The Tribunal's comments on the financial aspects of the reform appear to be based on the assumption that the Arbitration Board would function in the same manner as the Tribunal, and have two five-week sessions annually. As explained in paragraph 42 of the report, given the full-time service of the Chairperson and Alternate Chairperson in New York and Geneva - a distinctive feature of the Arbitration Board - it is estimated that 10 one-week sessions in New York and six one-week sessions at Geneva would ensure a prompt and timely consideration of the cases.

5. The Secretary-General regrets to report that he has now been informed that the Staff Union of the United Nations Secretariat does not support the proposed reform in its present form, for the reasons set out in annex II. He wishes to emphasize that the report is fully consistent with all the agreements reached with the staff throughout the consultation process on the reform, which agreements he has endorsed. This is so in particular with respect to: (a) the active participation of the staff in the selection process for the arbitrators and the Coordinator of the ombudsman panels, (b) the addition of a Legal Officer to the existing staff of the Panel of Counsel, (c) the commitment that the entire issue of the right to counsel and the adequacy of the available resources in that respect will be included in the two-year review of the entire process, and (d) the decisions made by the Arbitration Board on suspension of action, which will be binding when there has been a prior agreement to give the Arbitration Board the authority to issue a binding decision in a case.

6. With respect to the review of Tribunal judgements by the International Court of Justice, the Secretary-General notes that the review of the procedure provided for under article 11 of the Tribunal's Statute was conducted in accordance with General Assembly decision 48/415 of 9 December 1993. The issue is distinct from those under discussion with the staff concerning the reform of the internal system of justice, which focused exclusively on the process prior to consideration by the Tribunal.

7. The Secretary-General is convinced that the proposals contained in his report (A/C.5/50/2) will ensure a fair, efficient and expeditious internal system of justice within the United Nations.

ANNEX I

Comments by the United Nations Administrative Tribunal dated 8 November 1995, with Regard to the Report of the Secretary-General of 27 September 1995 (A/C.5/50/2)

Background

1. During a meeting on 25 July 1995 between the Under-Secretary-General for Administration and Management and the members of the Tribunal, it was indicated that a consolidated report on the reform of the internal system of justice in the United Nations Secretariat was to be submitted by the Administration to the General Assembly. The members of the Tribunal informed the Under-Secretary-General on 25 July 1995, that, if it had any additional comments, they would be communicated to him. That report, dated 27 September 1995, has now been transmitted to the General Assembly and was received by the Tribunal from the Under-Secretary-General on 30 October 1995. The Tribunal's further comments and observations are set forth below.

General concerns relating to the Joint Appeals Board

2. Paragraphs 18 through 22 of the report dated 27 September 1995 (the consolidated report) deal with several matters relating to the Joint Appeals Board (JAB) not addressed in the report dated 18 March 1995 (A/C.5/49/60), to which the comments previously submitted by the Tribunal were directed. In addition, paragraph 24 of the consolidated report enlarges on and modifies in a rather surprising manner a mild comment contained in paragraph 15 of the 18 March 1995 report, with the effect of condemning severely the performance of the JABs. Except as the comments below with respect to paragraph 24 of the consolidated report may bear on matters in other paragraphs of the consolidated report, the Tribunal does not consider itself competent or sufficiently informed to comment extensively on the new matters. Thus, for example, the Tribunal cannot comment with regard to views expressed by the staff. Nor can it discuss the availability of or difficulties involved in securing volunteers to serve on joint appeals boards. The Tribunal likewise has no basis for expressing views concerning the attitudes, or reactions, of JAB members regarding the frequency of serving on JABs, or those of other staff concerning perceptions of conflicts of interest or bias. However, it would appear that a number of these matters might be susceptible to solution through the adoption of appropriate rules concerning potential conflicts or bias, and through reform of the system of selection of JAB members.

Statistical review of JAB recommendations

3. In contrast to paragraph 15 of the 18 March 1995 report, paragraph 24 of the consolidated report cites differently formulated statistics with respect to the period 1991-1994 and states that 55 per cent of the unanimous recommendations of JABs had to be rejected in whole or in part because they disregarded established policies, were based on a defective application of the law, or were not supported by the evidence. The consolidated report also states that in about 70 per cent of the cases where the Secretary-General rejected a

unanimous JAB recommendation in whole or in part, the Tribunal either rejected entirely applications against such decisions or ordered a measure that was significantly less drastic than that which the JAB had recommended. In only about 20 per cent of the cases, it is asserted, did the Tribunal agree with the views of the JAB. In 10 per cent, the Tribunal is said to have disagreed with both the JAB and the Administration and decided on measures significantly different from those recommended by the JAB. The impression created by paragraph 24 is that the JABs have been performing very poorly, and this appears to be one of the principal reasons put forward for replacing JABs with an Arbitration Board.

4. In the opinion of the Tribunal, the impression created by paragraph 24 gives a distorted picture, and is therefore not fair to the JABs. The Tribunal's review of its approximately 185 judgements during that period does not lead it to a similar conclusion. More importantly, however, it appears that evaluating the quality of JAB work on the basis of a year-by-year average statistical count of unanimous JAB recommendations can be open to serious question. The statistical significance of yearly calculations can be affected by relatively small numbers and by the cases that do not involve appeals from decisions relating to unanimous United Nations JAB recommendations. In the view of the Tribunal, it is far more informative to examine all United Nations JAB reports over longer periods than single years, whether or not unanimous, and whether or not cases were appealed to the Tribunal. The examination should focus on the issues in dispute, the analysis made by the JAB of the evidence before it, the reasoning underlying the JAB recommendations, as well as why and the extent to which the Secretary-General rejected them. If the case was appealed to the Tribunal, a similar analysis of its judgement could also be of assistance. Without the sort of in-depth analysis suggested above, it would, in the opinion of the Tribunal, be very difficult, if not impossible, to arrive at a valid judgement concerning the quality of JAB work.

5. With respect to appeals that have come to the Tribunal, it is also less than helpful to assess them on the basis of unanimous recommendations that were rejected in whole or in part. In disputes considered by United Nations JABs (which do not include the numerous cases that come before the Tribunal involving the Joint Disciplinary Committee, job classification or medical matters, the International Maritime Organization, the International Civil Aviation Organization, the United Nations Relief and Works Agency for Palestine Refugees in the Near East, the United Nations Joint Staff Pension Fund matters or direct appeals with the Secretary-General's agreement), the great majority of appeals, for example during the period 1989-1994, as well as those between 1991 and 1994, stemmed from cases in which (1) the Secretary-General accepted, as he always does, a JAB recommendation sustaining his position when it is unfavourable to the staff member or (2) the Secretary-General substantially accepted the recommendations of the JAB, but the staff member appealed regarding aspects, often minor, of those recommendations that had not been accepted by the Secretary-General, or because the staff member sought more than the JAB

recommended. a/ In these two categories of cases, the Secretary-General has frequently prevailed at the Tribunal level. He has prevailed less often in cases in which the JAB recommendation wholly or substantially rejects the Secretary-General's position, and he has declined to adopt the recommendation. There have been cases in which the Secretary-General has disagreed with major JAB recommendations on important issues and the Tribunal has sometimes sustained the Secretary-General's position and sometimes that of the JAB. In other cases, the Tribunal's decision differed markedly from the Secretary-General's or the JAB recommendation.

6. In the overwhelming number of the foregoing cases, the JAB report by no means reflected incompetence, lack of analysis or lack of understanding. Instead, differing theories and varying points of view were usually involved, which were worthy of serious consideration. In only a small number of cases over the past several years, could it be fairly said that the position of the JAB, rejected by the Secretary-General, was untenable, and for that reason was also rejected by the Tribunal.

7. In the view of the Tribunal, the JABs, on the whole, have been performing commendably and have made valuable contributions to the system of justice within the United Nations. It seems wrong to the Tribunal to arrive at conclusions regarding JAB performance merely through statistics, rather than analytical study.

8. Indeed, if one accepts the statistics presented by the Secretary-General in paragraph 24 of the consolidated report (A/C.5/50/2), despite the matters discussed above, it would appear that, in approximately 85 per cent of the cases that reach the Tribunal, the Secretary-General has found the JAB recommendation acceptable or has been sustained at the Tribunal level. Based on the figures in the consolidated report, the Secretary-General's denial of the relief sought by the staff member fails to succeed in only about 15 per cent of the cases reaching the Tribunal. Even without considering the cases in which the Secretary-General's position has been substantially upheld by the JAB and the Tribunal, that would seem to be a highly acceptable success rate in litigation. Of course, the Tribunal makes no criticism of either the Secretary-General or the staff for wishing to achieve a higher success rate at every level of litigation. That is only natural. Nor does the Tribunal disagree with the objectives of all parties to reduce the amount of litigation at all levels.

Financial aspects of the proposed reform

9. The Tribunal notes that the financial aspects of the proposed reform have been modified. The Tribunal continues to doubt whether the part-time members of the New York Arbitration Board would be able to deal with an estimated annual case-load of 90 (which may be an underestimate) in two five-week sessions. Taking into account the limited number of cases the Tribunal is able to dispose

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a/ There are, of course, some cases in which a recommendation by a JAB favourable to the staff member is accepted by the Secretary-General even though he had urged rejection of the staff member's claim before the JAB.

of each year, approximately between 50 and 60 in two five-week sessions (A/C.5/49/60/Add.2, para. 3, of 26 June 1995), with only rare oral hearings, it would anticipate that an Arbitration Board would face much difficulty in dealing with 90 cases in two five-week sessions if evidentiary hearings, including oral argument, were required in a significant number of them. This would be so, even if all of the members could devote as much time as needed to study the files before each five-week session. In short, time requirements indicate that the arbitration structure is likely to be significantly more expensive than the estimate suggests in paragraph 69 of the consolidated report, merely with respect to the salary and per diem figures for the non-full-time members in New York. Furthermore, unless the part-time arbitrators are expected to pay for incidental clerical and secretarial costs out of their own pockets, when they are working on cases in their own offices away from Headquarters, there will probably be additional costs of that nature which have not been included in the estimate.

10. The Tribunal notes from the consolidated report that the Secretary-General has adopted its technical comments regarding statutory or rule changes.

11. Finally, except as supplemented above, the Tribunal's other comments reproduced in document A/C.5/49/60/Add.2 of 26 June 1995 remain as previously stated.

ANNEX II

Comments by the United Nations Staff Union, dated 15 November 1995, on the reform of the internal system of justice in the United Nations Secretariat (A/C.5/50/2)

1. The primary concern of the staff when reviewing the above document was to ensure that the agreements reached through the Staff Management Coordination Committee (SMCC) mechanism were fully respected. The staff must point out that the terms of agreement reached at the nineteenth session of SMCC, concerning the reform of the internal justice system, have been altered.

2. The report of the Secretary-General is unique in that it conveys the position of the Administration as well as the views of the staff. The draft of the original version (A/C.5/49/60 of 18 March 1995) was shared with the staff for comment. However, the above report was not provided to the staff prior to publication, even though the document is riddled with references to our support and has since been used by the Advisory Committee on Administrative and Budgetary Questions in its review.

3. The tone that prevailed in the inter-sessional and formal discussions of SMCC primarily focused on the need for a justice system with sufficient checks and balances as to inspire confidence so that all parties would have faith in the process. This would include the maintenance of the joint quality of the process and the right to competent counsel. A system that does not enjoy the trust of all parties is destined to fail.

4. In paragraph 24 of the report (A/C.5/50/2), the Administration cites a number of statistics concerning the Joint Appeals Board (JAB) that are interpreted in a questionable manner. According to the report, in 70 per cent of JAb recommendations, the Administrative Tribunal either rejected the claim or ordered a lesser measure. If such statistical tabulations are made, then other considerations should be taken into account, for example, the percentage where the Tribunal agreed but ordered a lesser measure. The staff's research indicates that the majority of recommendations rejected by the Secretary-General are upheld by the Tribunal.

5. In fact, it should be noted here that over the past two years, the Secretary-General accepted the wisdom of the Joint Appeals Board in 99.5 per cent of the cases when the Board supported the decision of the Administration. His confidence in the JAB dropped dramatically in cases where the Board supported the appellant. The crisis in the justice system appears to be the inability of management to be accountable for incorrect or improper decisions.

6. In paragraph 28, there is a reference to the independence of the Arbitrators. The staff wish to point out that as long as the Arbitrators are recruited and paid by the United Nations Secretariat, there is need for every precaution to be taken to ensure that they are truly independent, which is why the agreed-upon selection process must be joint.

7. A detailed selection process by a joint staff-management panel for the Ombudsman Coordinator, Chairperson, Alternate Chairperson and members of the Arbitration Board, which was agreed to by staff and management, has been suppressed in the document.

8. If the internal justice system is to be professionalized and all who review and make recommendations are to be lawyers, it is essential that the appellants have similar representation. Currently, too many staff go through the appeals process without the effective assistance of counsel because there are very few available internally. The staff specifically agreed to the "strengthening" of the Office of the Coordinator of the Panel of Counsel. It was agreed that there would be a Coordinator and an Assistant, and added to the existing staff would be a Legal Officer and an Assistant. Given the volume of work that has been consistent since 1987, the functions cannot be properly performed by only one additional person.

9. Regarding paragraphs 32 and 33 on binding arbitration, the text agreed at SMCC should be included, as follows:

> "However, when there had been a prior agreement to give the Arbitration Board the authority to issue a binding decision in a case, including on a request for suspension of action, the Secretary-General, as well as the staff member, should be bound by the decision of the Board on suspension of action."

10. In a document comprising 73 paragraphs of text, only two concerns of the staff, in paragraph 71, were placed on the record. It is unfortunate that those concerns are immediately refuted in the following paragraph without allowing the reader to decide whether the concerns are meritorious or the staff given the chance to comment on these rebuttals.

11. The reference to performance appraisal should be deleted.

12. In paragraph 2 of article 3 of the Statute, which reads:

> "The Chairperson and Alternate Chairperson of the Arbitration Board shall be appointed by the Secretary-General, after consultation with the staff ...", the word "after" should be replaced by the word "in", and all other references to appointments of officials to administer the proposed internal justice system should be similarly amended.

13. When the above issues were discussed with the United Nations Administration, the staff requested the issuance of a corrigendum to document A/C.5/50/2 incorporating the above views into the text. The Administration informed the staff that the Secretary-General intended to transmit simultaneously to the Assembly the additional comments made by the Administrative Tribunal and the staff as an addendum. The staff considers an addendum to be unacceptable.

14. It should also be noted that, despite the agreement at SMCC that no changes would be effected concerning the Tribunal until consultation had taken place with the staff, the Sixth Committee recently approved the deletion of article 11

of the Statute of the Tribunal, which reduced even further the appeals process open to staff.

15. We stand behind our initial commitment to reforms, but only as had been agreed upon. Deletion of such fundamental components of due process as adequate representation and agreement on the Arbitrators alters fundamentally the proposal. This is true to such an extent that we must state for the record that if document A/C.5/50/2 remains in its present form, it does not have the support of the staff.